United States Court of Appeals

for the Second Circuit

APPELLEE’S BRIEF

75-7203

To be argued by
RICHARD G. McGAHREN

United States Court of Appeals
FOR THE SECOND CIRCUIT

ROBERT ABRAHAMSON and MARJORIE ABRAHAMSON,
Plaintiffs-Appellants,

—v.—

MALCOLM K. FLESCHNER, WILLIAM J. BECKER, HAROLD B. EHRLICH, LEON POMERANCE, FLESCHNER BECKER ASSOCIATES, and HARRY GOODKIN & COMPANY,
Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

D'AMATO, COSTELLO & SHEA
Attorneys for Defendant-Appellee Harry Goodkin & Company
116 John Street
New York, N. Y. 10028
212—791-1527

RICHARD G. McGAHREN
KENNETH A. SAGAT
of Counsel

B
P/S

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES AND RULES

OTHER AUTHORITIES

BRIEF FOR APPELLEE
HARRY GOODKIN & COMPANY

PRELIMINARY STATEMENT

Plaintiffs-appellants, former limited partners of the investment partnership of Fleschner, Becker Associates ("FBA"), instituted this action against FBA, its general partners and Harry Goodkin & Co. ("Goodkin") alleging violations of Rule 10(b)-5 promulgated under the Securities Exchange Act of 1934 and Section 206 of the Investment Advisers Act of 1940. Goodkin is a firm of certified public accountants which examined and rendered opinions on certain annual financial statements of FBA. In this action, the plaintiffs-appellants have sought to recover an amount equivalent to the highest annual valuation of their partnership interests in FBA.

All defendants moved in the District Court for summary judgment which was granted upon the grounds principally advanced by FBA. On the motion, Goodkin adopted those grounds. This brief will address the contentions raised by the plaintiffs-appellants on appeal from the standpoint and perspective of Goodkin.

ISSUES PRESENTED FOR REVIEW

1. Whether the plaintiffs suffered damage in their withdrawal from FBA?

2. Whether the investment characteristics of the plaintiffs' participation in FBA remained fundamentally unchanged during the duration of their retention of their partnership interests?

3. Whether the plaintiffs may recover the highest annual valuation of their partnership interests from Goodkin through the award of a restitution measure of damages when Goodkin did not acquire, retain, use or dispose of their property or otherwise benefit from the plaintiffs' participation in FBA?

STATEMENT OF THE CASE

Nature of the Case Against Goodkin

Goodkin is a partnership of certified public accountants which examined the annual financial statements of FBA for the fiscal years of 1966, 1967 and 1968 and rendered its opinions thereon. The complaint alleges violations of Rule 10b-5 promulgated under the Securities Exchange Act of 1934 and Section 206 of the Investment Advisers Act of 1940. The principal claim made against Goodkin is that the annual financial statements of FBA for the fiscal year 1968 fail to disclose the extent of the partnership's investments in securities of which resale was restricted pursuant to the applicable provisions of the Securities Act of 1933--commonly known as "restricted securities". The plaintiffs do not claim that the valuations of the restricted securities reflected in the 1968 annual financial statement were erroneous or that the financial condition of FBA reflected and represented in the 1968 annual financial statements were false. Rather, the plaintiffs-appellees rely upon and adopt this financial statement to seek to recover in this action the highest valuation of their partnership interests in FBA.

FBA moved in the court below for summary judgment on the grounds, adopted by all of the defendants, that the plaintiffs did not suffer "actual damages" required by

Section 28(a) of the Securities and Exchange Act of 1934. The lower court found, as undisputed, that the plaintiffs made cash in hand profits on their capital contributions to the partnership and rejected the plaintiffs' contentions that they suffered actual damages and would be entitled to recover, if otherwise successful in the action, the difference between what the plaintiffs received upon the termination of their investment in FBA and what they would have received had they terminated at an earlier appropriate time.

On this appeal, the plaintiffs raise the contention that the revision of the FBA partnership agreement, dated October 1, 1968, may be viewed as the purchase of a security. If they are successful in this contention, they would succeed in breaking the chain of a continuous commitment to FBA and, arguably, transpose a "paper" loss into an actual loss. Except for a brief reference in the affidavit of the plaintiffs in opposition to the defendants' motion for summary judgment (S 33;168 a), this contention is a de novo one. The complaint does not allege the "purchase" of a security in 1968, and the plaintiffs' statement under Rule 9(g) of the court below does not state the occurrence of a "purchase" in 1968; but, rather, refers to a continuous participation by the plaintiffs' as limited partners in FBA from July 1, 1965 to September 30, 1970 (S 2; 129 a).

The plaintiffs' contention on appeal of the purchase of a security in 1968 has broad ramifications. It has relevance not only to the issue of the sufferance of "actual" damages but also to other issues which are not directly presented on this appeal but which are inextricably interwoven, including the issue which Goodkin raised in the court below of whether Goodkin's alleged failure to disclose the extent of FBA's investment in restricted securities was in connection with a purchase or sale by the plaintiffs.

Goodkin contends that the revision to the 1968 FBA partnership agreement did not constitute the "purchase" of a security and that the plaintiffs did not suffer any "actual" damages as a result of their investment in FBA. It submits, however, that specific identification of an actual purchase or sale is required for a proper pleading of an action allegedly brought under Rule 10b-5 and that the absence of such specification has enabled the inculcation of de novo and artificial issues into this action.

Undisputed Facts

On or about July 1, 1965, plaintiffs became limited partners of FBA then known as the Fleschner Company and withdrew as limited partners of FBA as of September 30, 1970 (129 a). FBA was organized by the execution of an agreement

of limited partnership dated as of July 1, 1965 which was amended as of April 1, 1966 and as of October 1, 1968 (39 a, 66 a, 87 a). Defendant Fleschner was at all times a general partner of FBA (31 a). Defendant Becker was a general partner commencing April 1, 1966 (141 a). Defendant Ehrlich was a general partner from October 1, 1968 to September 30, 1969 (141 a). Goodkin is a firm of certified public accountants which examined and rendered an opinion and statements of financial condition and related statements of FBA on December 26, 1968 for the year ending September 30, 1968; on December 16, 1967 for the year ending September 30, 1967; on November 21, 1966 for the year ending September 30, 1966; and on May 3, 1966 for the three months ending March 31, 1966 (27a, 130a).

The plaintiffs' participation in FBA was continuous from July 1, 1965 until September 30, 1970 (12 a, 132 a). As of October 1, 1968 the FBA partnership agreement was amended to effectuate certain management and administrative changes in the partnership.(1) The execution of the 1968 revision of the partnership agreement did not alter the financial or economic substance of the limited partners' interests. It did not require

---

(1) The record on appeal does not indicate whether the plaintiffs' receipt in January 1969 of Goodkin's report on the September 30, 1968 financial statements of FBA, dated December 26, 1968, was prior to their execution of the revision to the FBA partnership agreement dated as of October 1, 1968. See 132 a, 163 a.

the investment of additional capital, and it did not alter the nature of the participation of individual partners in the sharing of partnership capital or partnership income. The nature of the rights of the plaintiffs to a return on their investment capital remained static.

In late December 1969 or January 1970, the plaintiffs received a report by Brach, Lane, Hariton and Hirshberg, successor accountants to Goodkin, on the financial statements of FBA as at September 30, 1969 (132a). The fiscal 1969 financial statements specifically showed a reduction in total partners capital (excluding additional contributions by existing and new partners as of October 1, 1968) from $29,994,123 to $15,601,448 and correlative reductions in the capital accounts of the individual partners (209a, 213a). These financial statements also specifically showed in Note 1 the cost and value of "unregistered securities" as of September 30, 1969 (210a).(2) The report of the accountants thereon stated that the fiscal 1969 financial statements were stated in conformity with the general accepted accounting principles applied on a basis consistent with that of the preceding year (206a) and incorporated the net worth and capital account balances of the prior years financial statements reported on by Goodkin (194a, 209a, 213a).

---

(2) On October 21, 1969, the Securities and Exchange Commission commented for the first time in any context on the accounting treatment of restricted securities. S.E.C. Accounting Series Release No. 113 (October 21, 1969).

In July, 1970, some six months after receiving the 1969 financial statements, the plaintiffs gave notice of their intention to withdraw from FBA which was effectuated as of September 30, 1970.(3) The following figures represent the capital contributions, interim withdrawals, and final distributive shares of the plaintiff (295a, 296a):

Robert Abrahamson

Date	Capital Contributions	Withdrawals
July 1, 1965	$150,000.00	
Sept. 30, 1967		$ 8,000.00
Sept. 30, 1968		32,500.00
Sept. 30, 1969		70,000.00
Sept. 30, 1970		45,000.00
Distributive share on withdrawal from the partnership		150,097.00
TOTALS	$150,000.00	$306,097.00
Net Profit	$156,097.00	

---

(3) Deposition of Marjorie Abrahamson at p. 236 and exhibits A and B; 129, 132a.

Marjorie Abrahamson

Date	Capital Contributions	Withdrawals
July 1, 1965	$180,000.00	
Oct. 1, 1966	2,652.22	
Sept. 30, 1967		$ 57,015.70
Oct. 1, 1967	266,847.13	
Sept. 30, 1968		58,000.00
Sept. 30, 1968		52,500.00
Sept. 30, 1970		73,500.00
Distributive share on withdrawal from the partnership		$341,565.00
TOTALS	$449,499.35	$582,580.70
Net Profit	$133,081.35	

Each of the plaintiffs profited from their participation as limited partners in FBA.

ARGUMENT

POINT I

PLAINTIFFS DID NOT SUSTAIN DAMAGE IN THEIR WITHDRAWAL FROM THE PARTNERSHIP

Subsequent to the District Court's decision in this case, the Supreme Court held in Blue Chip Stamps v. Manor Drug Stores, 43 U.S.L.W. 4707 (U.S. June 9, 1975) ___U.S.___, that a person who is not an actual purchaser or seller of a security may not bring a private, damage action under Rule 10b-5. Thus the plaintiffs' contention on appeal that they "may be viewed as investors who were induced...to hold their securities"(4) and therefore,

(4) Brief for appellants, Point II, at p. 33.

that they are entitled to recover damages under Rule 10b-5 is without merit. Under Blue Chip, the plaintiffs, as holders of their partnership interests, and presumably as aborted sellers, do not have standing to recover damages under Rule 10b-5 (see slip opinion at B 2684-5).

Upon their withdrawal from the partnership, furthermore, the actual sale of their partnership interests, the plaintiffs did not suffer damage.(5) They do not claim that upon their withdrawal from the partnership they received less than the fair value of their partnership interests.

The rule of Affiliated Ute Citizen v. United States, supra, at 155, of the correct measure of damages for a defrauded seller is "the difference between the fair value of all that the...seller received and the fair value of what he would have received had there been no fraudulent conduct... except for the situation where the defendant received more than the seller's actual loss." It is clear that the plaintiffs-appellant distort this language and mix apples with oranges by

---

(5) Moreover, plaintiffs do not allege a violation of Rule 10b-5 in connection with their actual withdrawal from the partnership. The last report rendered by Goodkin was its report on the 1968 financial statements of FBA which was issued on or about December 26, 1968, approximately 18 months prior to the withdrawal of the plaintiffs from the partnership. Accountants, other than Goodkin, reported on the financial statements of FBA for the fiscal year 1969 (Complaint § 17 at 8 a; 206-213a).

arguing that the fair value of what they would have received had there been no alleged fraudulent conduct is the valuation of these partnership interests as of September 30, 1968 (Brief for Appellants, at p. 35). There is no doubt, judging by the facts of Affiliated Ute Citizens, that the reference of the Supreme Court is to the fair value of what the seller would have received in the sale had there been no fraudulent conduct in connection with the sale. Needless to say, further, Goodkin did not receive anything upon the plaintiffs' withdrawal from FBA.

Affiliated Ute Citizens should not be turned upside down and backwards to create damages where none exist. The withdrawal of the plaintiffs from FBA effectuated the realization of substantial profits on their investment in FBA (295a, 296a).

POINT II

THE INVESTMENT CHARACTERISTICS OF PLAINTIFFS PARTICIPATION IN FBA REMAINED FUNDAMENTALLY UNCHANGED DURING THE ENTIRE DURATION OF THE RETENTION OF THEIR PARTNERSHIP INTERESTS

In order to establish a predicate for "actual damages", the plaintiffs-appellants also urge that they "may be viewed as investors who were induced by material or misleading statements to make a new investment

in or about 1968, when they executed a substantially modified limited partnership agreement."(6) In so contending, they have failed to recognize that the amendments to the FBA partnership agreement in 1968 authorized administrative or management changes in the partnership and did not fundamentally alter the investment characteristics of their participation in the partnership.

On its face, the FBA partnership agreement shows that it served the dual functions of defining the partners' participation in the partnership and establishing the administrative and management structure of the partnership. Clearly the effectuation of these two purposes in a single document should not obscure these distinct functions. Certainly, the plaintiffs-appellants would not urge that the effectuation of changes in the administrative and managerial structure of a corporation by amendment of articles of incorporation or by resolution of the Board of Directors constitute the purchase of a new security.

Indeed, the cases primarily relied upon by the appellants show the essential distinction between changes in management and changes in investment characteristics. In these cases, a purchase or sale of a new security was found when the investment characteristics of a security--returns, participative rights in the enterprise, capital commitments, etc.--were fundamentally altered. In <u>SEC</u> v. <u>Associated</u>

---

(6) Brief for Appellants, pt. I, at p. 14

Gas & Co., 24 F.Supp. 899 (S.D.N.Y. 1938), aff'd 99 F.2d 795 (2d Cir. 1938), the maturity date of an interest bearing investment certificate was extended to decrease the yield to maturity of the certificates, and, thereby, to change the effective interest rate of the security. In the United States v. New York, New Haven and Hartford Railroad Company, 276. F.2d 525 (2d Cir. 1960), cert. den., 362 U.S. 961 (1960), an agreement specifying the rights of preferred stockholders was modified so as to fundamentally affect the investors' returns on their investment: dividend rights were waived; put and call rights were altered with respect to the time for and the price at exercise.

Ingenito v. Bermec Corporation, 376 F.Supp. 1154 (S.D.N.Y. 1974) also involved fundamental modifications of the investment characteristics of the types of securities involved in that case: first, notes were exchanged extending payment terms and containing waiver and estoppel provisions which allegedly prevented the givers of the notes to terminate, through recission, obligatory payments; second, maintenance contracts for the maintenance of cattle were exchanged so as to alter the investors' obligations to commit funds to the cattle raising enterprise through maintenance charges; and, third, maintenance contracts were exchanged coupled with grants of additional cattle which also modified the obligations of the investors to commit funds in the form of maintenance payments and which

required the investors to fund directly additional cattle which represented the underlying asset of the investment contract. Cleraly, the modifications of the notes and the maintenance contracts in the *Ingenito* case directly altered the relationship of the funds invested to the returns to be derived.

United States v. *Wernes*, 157 F.2d 797 (7th Cir. 1946) and *United States* v. *Riedel*, 126 F.2d 81 (7th Cir. 1942), also cited by the plaintiffs-appellants, are not to the contrary. In each case, the court held that the various certificates exchanged were certificates defined as securities under section 2(1) of the Securities Act of 1933. The issue presented by the plaintiffs on appeal, however, is when an amendment or modification of an agreement evidencing the ownership of a security constitutes the purchase of a new security in the absence of the delivery of a certificate defined in the securities acts as a security.[7]

A standard emphasizing the investment characteristics of a security finds support in the definitions of a security in Section 2(1) of the Securities Act of 1933 and Section 3(a)(10) of the Securities and Exchange Act of 1934. Each section states that a security is "...in general, any instrument commonly known as a 'security'." Furthermore,

---

(7) It is assumed *arguendo*, as in the court below, that the plaintiffs' partnership interests reflected in the partnership agreement constitutes a security under the Securities and Exchange Act of 1934.

the practical investment marketplace would look to the investment and economic characteristics of the modifications to determine whether they have brought into being a new security. United States v. New York, New Haven and Hartford Railroad Co., supra, at 532.

The 1968 amendments to the FBA partnership agreement were confined to administrative and management matters did not fundamentally alter the investment characteristics of the plaintiffs' participation in FBA.[8] The nature of the participation of the limited partners in the assets, gains, and losses of FBA remained unchanged; the plaintiffs did not become obligated to invest additional funds; the capital account of each partner as of September 30, 1968 remained static.

Upon the execution of the 1968 amendments, the position of the plaintiffs as investors remained unchanged. This case does not present a merger situation resulting in a change in investor interests, SEC v. National Securities, 393 U.S. 454 (1969). This case does not present a liquidation of the plaintiffs' partnership interests, Bolger v. Laventhol, Krekstein, Horwath & Horwath, CCH Fed. Sec. L.Rep. § 94,618 (S.D.N.Y. 1974); Feldberg v. O'Connoll, 338 F.Supp. 744 (D.Mass. 1972). The holding of In Re Penn Central Securities Litigation, 347 F.Supp. 1338 (E.D.Pa. 1972), reviewed on

---

(8) A detailed analysis of the 1968 amendments appears in the brief submitted by FBA which we do not repeat here.

reh. 357 F.Supp. 869 (E.D.Pa. 1973), aff'd 494 F.2d 528 (3rd Cir. 1974) is apt:

> "The result of the reorganization was that an existing corporation was restructured. There were no additions to the corporation by way of merger or acquisition, and the stockholders' interest in the corporation were materially unchanged by the reorganization. In terms of the total assets represented by each share of stock, stockholders of Penn Central Co. were in exactly the same position after the reorganization as they were before it occurred." 347 F.Supp. at 1327.

The conclusion that the amendments to the 1968 partnership agreement of FBA did not constitute the purchase of a security is bolstered by the undisputed fact that the record on appeal does not contain a single representation by the plaintiffs that they personally made an investment decision when executing the 1968 amendment to the partnership agreement. The complaint does not allege that the plaintiffs made a purchase upon executing the 1968 amendment. Cf. Ingenito v. Bermec Corporation, supra, at 1178-1182. The statement of plaintiffs pursuant to Rule 9(g) of the court below does not state that the plaintiff made an investment decision and a purchase upon executing the 1968 amendment (129-137a); and, indeed, the plaintiffs' statement

demonstrates a continuous participation in FBA (§ 2,129a).[9]

Although the plaintiffs' affidavit in opposition to the defendants' motion for summary judgment alludes once to the signing of the 1968 amendment, it merely states that "this might well be deemed the purchase of a security" (168a). Even the position of the plaintiffs on appeal is only that the execution of the 1968 amendments may be <u>viewed</u> as a purchase

The conclusion is ineluctable that the plaintiffs' execution of the 1968 amendments to the FBA partnership was not a "purchase" from their subjective, as well as, by the appropriate objective standards. The 1968 amendments did not alter the investment characteristics of the plaintiffs' partnership interests in FBA, and, thus, the plaintiffs did not purchase a new security upon the execution of the 1968 amendments.

---

(9) This is not to say that subjective matters should determine whether the plaintiffs were actual purchasers. <u>Blue Chip Stamps</u> v. <u>Manor Drug Stores</u>, 43 U.S.L.W. 4707 (U.S. June 9, 1975) __U.S.___. Where, however, the complainants have an obligation to plead and state with reasonable clarity a violation of Rule 10b-5 in connection with an actual purchase on their part, <u>Herpich</u> v. <u>Wallace</u>, 430 F.2d 792, 808 (5th Cir. 1970), the absence of a pleading or statement of an actual purchase is undoubtedly relevant.

POINT III

PLAINTIFFS MAY NOT RECOVER THE HIGHEST ANNUAL VALUATION OF THEIR PARTNERSHIP INTERESTS FROM GOODKIN THROUGH THE AWARD OF A RESTITUTIONAL MEASURE OF DAMAGES

The plaintiffs' contention that the 1968 amendments constituted a purchase is pertinent to their appeal if they suffered damages as a proximate consequence of having been induced to execute the 1968 amendment. They do not, because they cannot, contend that upon their execution of the 1968 amendments, which they argue constitutes a "purchase", they received less than fair value; nor do they, because they cannot, contend correlatively that a "sale" of their partnership interests in an ante October 1, 1968 FBA upon the execution of the 1968 amendments was for less than fair value--their capital account was the same as of September 30, 1968 to as of October 1, 1968 (194a, 209a). Indeed, the plaintiffs do not contend that the valuation of their partnership interests as of September 30, 1968 reflected in the annual financial statement of FBA was erroneous, and, rather, they rely upon that valuation to support their proposed measure of damages.(10)

---

(10) Brief for Appellants, pp. 31, 38; 170a, 171a

The plaintiffs contend that the proper measure of damages with respect to all defendants is the difference between the valuation of the partnership interests on September 30, 1968 and the amount they received upon withdrawal from FBA in 1970 (Brief for Appellants, p. 31).(11) Under this measure of damages, the plaintiffs seek restitution of an amount equivalent to the valuation of capital accounts as of September 30, 1968. The valuation as of this date was the highest annual valuation of their capital accounts (see, e.g. 189a, 197a, 213a).

To support their theory of damages, the plaintiffs rely on Chasins v. Smith, Barney & Co., 438 F.2d 1167 (2d Cir. 1970) where this court held that a market maker in

---

(11) Plaintiffs calculate that under this measure of damages plaintiff Robert Abrahamson's would be $454,979 and plaintiff Marjorie Abrahamson's would be $799,821. See Brief of Appellants at p. 31. We note that this measure of damages apparently ignores interim capital withdrawal in 1969 by Robert Abrahamson of $115,000 and interim withdrawals by Marjorie Abrahamson in 1969 and 1970 of $126,000.

a security who failed to disclose its market making role to a purchaser of the securities was liable for the difference between the purchase price and the amount subsequently received upon the sale of the securities (prior to the purchaser's awareness of a violation of the Securities and Exchange Act). Smith, Barney appears a departure from the general rule that the measure of damages to a defrauded buyer is the difference between "what he paid over the value of what he got..." Levine v. Seilon, Inc., 439 F.2d 328, 334 (2d Cir. 1971).(12) We note that there is apparently no difference in the measure of damages in a buyer's and in a seller's suit under Rule 10b-5. Zeller v. Bogue Electric Manufacturing Corp., 476 F.2d 795 (2d Cir. 1973), cert. denied, 414 U.S. 908 (1973), and we note that the Supreme Court held in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) that the correct measure of damages in a Rule 10b-5 seller's suit is the difference between the fair value received and the fair value of what would have been received in the absence of fraudulent conduct.(13)

---

(12) Since the value of what the plaintiffs gave was equal to the value of not only what the plaintiffs received but also what was represented they would be receiving, this case does not raise any question of the applicability of the "benefit of bargain" rule which, in any event, was rejected by Levine v. Seilon, Inc.

(13) The Supreme Court also stated that if the defendant in a seller's 10b-5 suit received more than the seller's actual loss the proper amount of damages is the amount of the defendant's profits. 406 U.S. at 155. This is consistent with traditional principles of restitution. See Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965) cert. denied, 382 U.S. 879 (1965); Restatement of Restitution (1937) § 151; McCormick, Handbook on the Law of Damages (1935), § 48, fn. 111.

We note, as well, that Affiliated Ute Citizens relies upon Chasins v. Smith Barney in its discussion of the substantive violation of Rule 10b-5 but does not discuss the case in stating the correct measure of damages under § 28 of the Securities and Exchange Act.

Goodkin was not a market maker and Goodkin did not acquire, retain, use, or dispose of the plaintiffs' property or otherwise benefit from the plaintiffs' participation in FBA. The obtaining of a benefit is a pervasive concept under principles of restitution, and a duty of restitution does not arise unless the person to be charged with restitution has obtained a benefit.(14) Restatement of Restitution (1937), § § 28, 128, 138, 150, 151, 197. Since Goodkin, an accounting firm, did not acquire, retain, use or dispose of the plaintiff's property or otherwise benefit therefrom, Goodkin may not be required to restore

---

(14) We note that Zeller v. Bogue Electric Manufacturing Corp., supra, fn. 10, recognizes that restitution seems "to be based not only on a feeling that the party who has acted wrongfully should not be permitted to benefit from his conduct but also that an injured party should be given the benefits of a transaction he would otherwise have been in a position to enter into." Clearly, the case does not reject the necessity for the alleged wrongdoer to have received benefit.

the plaintiff's capital accounts as of September 1, 1968.(15)

The appropriate measure of damages with respect to Goodkin would be the measure premised upon fraud in tort--the difference between the fair value of what the plaintiffs gave as compared to what they received;(16) and, here, the plaintiffs do not claim to have received less than fair value. They rely on the fair value of their partnership interests presented in the 1968 fiscal annual financial statements reported on by Goodkin and affirmed in the 1969 fiscal annual financial statements reported on by successor accountants.

Thus, the plaintiffs' strained efforts to inject a "purchase" into their continuous commitment to FBA, do not establish a basis for recovering damages from Goodkin in this action. The plaintiffs made actual profits from participating in FBA; and, under any view, their 1969-1970 paper losses do not change the fact of their 1965-1970 actual profits.

---

(15) See: Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90, 105 (10th Cir. 1970).
This conclusion is also applicable to the plaintiffs' claim; if any, against Goodkin, under Section 206 of the Investment Advisors Act. See Restatement of Restriction (1937) § 138. We are compelled to note, as well, the obvious inapplicability of this statute to Goodkin in view of the express exemption afforded to accountants in the definition of an "investment advisor" in Section 202(a)(11) of that Act. The complaint does not allege that Goodkin was "an investment advisor" (Complaint, § 20 at 9a).

(16) Special damages are not an issue in this case. See Zeller v. Bogue Electric Manufacturing Corp., supra.

CONCLUSION

For the foregoing reasons, the order and judgment of the District Court granting defendant's motion for summary judgment dismissing the complaint should be affirmed.

Respectfully submitted,

D'AMATO, COSTELLO & SHEA
Attorneys for Defendant-Appellee
Harry Goodkin & Co.
116 John Street
New York, New York 10038
Tel: 212/791-1500

Of Counsel:

Richard G. McGahren
Kenneth A. Sagat